Southern Power Company *and* International Brotherhood of Electrical Workers Local Union 84

International Brotherhood of Electrical Workers, System Council U 19 on behalf of Local 801–1 *and* Southern Company Services. Cases 10–CA–37348 and 10–CA–37414

March 20, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 3, 2008, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and an answering brief. The Respondent filed an answering brief and a reply brief, and the General Counsel filed a reply brief. The Charging Party filed cross-exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified herein, and to adopt the recommended Order as modified.

We affirm the judge's findings that the Respondent was a successor employer and violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with International Brotherhood of Electrical Workers (IBEW) System Council U 19, on behalf of Local 801–1, as the exclusive bargaining representative of operations technicians in one plant previously operated by Alabama Power, and by refusing to recognize and bargain with IBEW Local 84 as the exclusive bargaining representative of operations technicians in three plants previously operated by Georgia Power.[2] However, we reverse the judge and find that the Respondent failed to prove that a bargaining unit consisting of operations technicians at all three former Georgia Power plants is not an appropriate unit.

In making his unit determination, the judge declined to give any weight to the historical representation of employees in the three former Georgia Power plants because Local 84 represented them as part of a much broader multiplant unit. The judge then found that a three-plant unit was not appropriate because the plants were part of a grouping of eight plants owned and operated by the Respondent, were located between 70 and 185 miles away from each other in two different states, and there was no evidence of interchange of employees or functional integration for those plants.

We find that the judge erred by failing to give proper consideration to the importance of multiplant bargaining history in his unit determination. "Both the Board and the courts have long recognized not only that the traditional [community-of-interest] factors, which tend to support the finding of a larger or single unit as being appropriate, are of lesser cogency where a history of meaningful bargaining has developed, but also that this fact alone suggests the appropriateness of a separate bargaining unit and that compelling circumstances are required to overcome the significance of bargaining history." *Children's Hospital of San Francisco*, 312 NLRB 920, 929 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996).[3] Contrary to the judge, the Board has assigned the same weight to bargaining history in cases where the unit in the successor's operation is only a portion of the predecessor's bargaining unit. See *White-Westinghouse*, 229 NLRB 667, 674–675 (1977), enfd. sub nom. *Electrical Workers v. NLRB*, 604 F.2d 689 (D.C. Cir. 1979) (successor's employees in five plants of the predecessor's larger multiplant unit remained an appropriate unit), and *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1085 (D.C. Cir. 2003) (stating that there is no authority supporting the successor employer's argument that the presumptive appropriateness of a unit of historically-represented employees does not apply to a subset of the predecessor's recognized unit).[4]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] We affirm the judge's finding that Sec. 10(b) bars the Respondent's challenge to the legality of the initial recognition of the unions in this case by Alabama Power and Georgia Power. We do not rely on the judge's findings in fns. 2 and 3 of his decision that these parties' respective initial bargaining agreements were legal and that, even apart from the 10(b) bar, the Respondent should be estopped from asserting that the hiring of employees at the plants involved was part of an illegal prehire arrangement.

[3] See also *Canal Carting, Inc.*, 339 NLRB 969 (2003), *Met Electrical Testing Co.*, 331 NLRB 872, 872–873 (2000), and *Trident Seafoods Inc.*, 318 NLRB 738 (1995), enfd. 101 F.3d 111 (D.C. Cir. 1996).

[4] We reject the judge's attempt to distinguish *White-Westinghouse* from the present case on grounds that the successor in *White-Westinghouse* created a subsidiary to hold the plants purchased from the predecessor and applied the predecessor's bargaining agreement to the employees at those plants. Those facts were supplemental to the key finding by the judge that "[a]lthough this multiplant unit was only part of the industrywide unit under [the predecessor] Westinghouse and only part of the [successor] White's appliance division which included some plants not represented by the Union, its bargaining history is such that the wages, terms, and conditions of employment involved were

Accordingly, the Respondent bears the heavy burden of showing compelling circumstances why a three-plant bargaining unit based on historical representation as part of the multiplant Georgia Power unit is no longer appropriate. It has failed to meet this burden. In this regard, the Board has previously found that the community-of-interest factors cited by the judge—the Respondent's operational grouping of the three plants with other unrepresented plants, the geographical separation of the three plants, and the lack of employee interchange and functional integration among those plants—do not constitute "compelling circumstances" sufficient to disturb the Union's historical representation of employees in those plants in one multiplant unit. See, e.g., *Met Electrical,* 331 NLRB at 872; *White-Westinghouse*, 229 NLRB at 674.

In sum, we find that the three-plant unit which IBEW Local 84 seeks to represent is an appropriate bargaining unit and that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with Local 84 on this multiplant basis. We shall modify the relevant provisions of the recommended Order and notice in accord with our unit determination.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Southern Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Failing and refusing to recognize and bargain with Local 84 as the exclusive bargaining representative of the employees in the following appropriate unit:

> All operations technicians employed by the Respondent at Plant Dahlberg, Plant Franklin, and Plant Wansley, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act."

2. Substitute the attached notice for that of the administrative law judge.

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determined as a group. . . . Thus, there is a community of interest among the former Union-represented Westinghouse employees quite different from other White employees simply because of their historical multiplant representation. Any prior differences, including geographical separation and lack of interchange of employees—matters sometimes relevant in determining *ab initio* unit appropriateness—are rendered considerably less significant by this common history." 229 NLRB at 674 (emphasis added).

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, System Council U 19 on behalf of Local 801–1 as the exclusive bargaining representative of the employees in the following appropriate unit:

> All operations technicians employed by us at Plant Harris, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local 84 as the exclusive bargaining representative of the employees in the following appropriate unit:

> All operations technicians employed by us at Plant Dahlberg, Plant Franklin, and Plant Wansley, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, recognize and bargain with Local 801–1 for the employees it represents in the above appropriate unit of Plant Harris employees; and, upon request, recognize and bargain with Local 84 for the employees it represents in the above appropriate unit of employees at Plants Dahlberg, Franklin, and Wansley.

SOUTHERN POWER CO.

Lauren Rich, Esq. and *Katherine Chahrouri, Esq.,* for the General Counsel.

Robert M. Weaver, Esq. (Nakamura, Quinn, Walls, Weaver & Davies, LLP), for the Respondent.

Michael D. Kaufman, Esq. (Troutman Sanders, LLP), for the Respondent.

M. Jefferson Starling III, Esq. (Balch & Bingham, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was tried in Birmingham, Alabama, on September 8, 2008. The consolidated complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Party Unions as the successor employer to Georgia Power and Alabama Power, which had had bargaining relationships and collective-bargaining agreements with the Charging Party Unions with respect to certain affected employees. The Respondent filed an answer denying the essential allegations in the complaint. Much of the record herein consists of stipulations and agreed-upon exhibits, augmented by testimony at the 1-day hearing. After the trial, the parties filed briefs, which I have read and considered.[1]

Based on the entire record, including the testimony of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times herein, Respondent Southern Power, a Delaware corporation with offices and places of business in Atlanta, Georgia, and Birmingham, Alabama, has operated facilities in a number of locations, including at Plant Dahlberg, in Nicholson, Georgia (here Plant Dahlberg); at Plant Franklin, in Smiths, Alabama (here Plant Franklin); at Plant Wansley, in Franklin, Georgia (here Plant Wansley); and Plant Harris, in Autaugaville, Alabama (here Plant Harris), where it has been engaged in the generation and sale of electricity at market-based rates in the wholesale market both to unaffiliated wholesale purchasers of energy as well as to purchasers which are corporate affiliates of Respondent, such as Georgia Power Company (here Georgia Power), Alabama Power Company (here Alabama Power), Gulf Power Company, and Mississippi Power Company.

During a representative 1-year period, Respondent, in conducting its business operations described above, has had annual revenues in excess of $250,000 from the sale of electrical energy, and has purchased and received at its Georgia facilities described above, products, goods and materials valued in excess of $50,000 from points outside the State of Georgia. In addition, during the same period, Respondent has had annual revenues in excess of $250,000 from the sale of electrical energy, and has purchased and received at its Alabama facilities described above, products, goods and materials valued in excess of $50,000 from points outside the State of Alabama. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The General Counsel filed an unopposed motion to correct transcript of record and exhibit, which I hereby include in the record and grant.

At all material times, Local 84 has been a labor organization within the meaning of Section 2(5) of the Act. At all material times, System Council U-19 and Local 801-1 have been labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Southern Company is a holding company that owns all of the outstanding common stock of a number of entities, including the Respondent herein, Southern Power Company, Southern Company Services (SCS), Georgia Power Company, and Alabama Power Company.

Respondent is an energy wholesaler in the competitive electricity market. It owns and manages generating facilities in Georgia, Alabama, Florida, and North Carolina, including the four facilities involved in this case (Plant Dahlberg, Plant Wansley, Plant Franklin, and Plant Harris). It neither owns nor controls transmission facilities (other than interconnection facilities) and does not have retail load or a franchised service territory. Respondent's business operations are not subject to the same traditional state regulation as public utilities, but Respondent is subject to regulation by the Federal Energy Regulatory Commission (FERC).

Alabama Power and Georgia Power are two of Southern Company's traditional public retail utility subsidiaries. Alabama Power has about 6800 employees, of whom about 2700 are, and have been for over 60 years, represented by International Brotherhood of Electrical Workers System Council U-19 and various IBEW locals, including Local 801. The most recent memorandum of understanding (MOU) between Alabama Power and the various IBEW locals represented by System Council U-19 is effective from September 14, 2004, to August 15, 2009. Georgia Power has about 9200 employees, of whom about 3600 are, and have been for many years, represented by IBEW Local 84. Georgia Power and Local 84 have been parties to successive collective-bargaining agreements, the most recent being effective July 1, 2005, through June 30, 2008.

SCS functions as a centralized service company and employs about 4200 people. It provides engineering, financial, human resources, accounting, auditing, and other services, upon request and at cost to Southern Company subsidiaries, including Southern Power, Georgia Power, and Alabama Power. At all material times, SCS has provided engineering, financial, human resources, accounting, auditing and other services to Respondent Southern Power at Plant Dahlberg, Plant Franklin, Plant Wansley, and Plant Harris. While SCS provides human resources and payroll functions for Respondent Southern Power, the employees involved herein are employed on behalf of Respondent Southern Power.

Respondent's generating facilities operate with comparatively small staffs of highly skilled employees who perform all the functions necessary to the combined operation of the plants. The employees at issue in this case are the employees who perform these functions at Plant Dahlberg (approximately 5 employees); Plant Franklin (approximately 25 employees);

Plant Wansley (approximately 15 employees); and Plant Harris (approximately 15 employees).

The Employee Units

The Respondent, Southern Power, initially staffed Plants Dahlberg, Wansley, and Franklin by entering into a labor services agreement with Georgia Power whereby Georgia Power provided the personnel to operate those plants. Respondent also initially contracted with Alabama Power to provide the staffing for Plant Harris under a labor services agreement. These staffing arrangements continued until January 2008, when Respondent terminated its labor services contracts with Alabama Power and Georgia Power.

Plant Harris. To meet its obligations under its labor services agreement to provide skilled labor necessary to operate Plant Harris, Alabama Power determined that it needed to create a new position, which it called general plant operator (GPO). At this time, Alabama Power believed that the then current collective-bargaining agreement did not include the classification or a job description for the GPO position. In March 2002, Alabama Power and System Council U-19 reached a new, separate bargaining agreement under which Alabama Power voluntarily recognized a new sub-local, Local 801-1 as the bargaining agent for a new, separate bargaining unit consisting solely of GPOs at Plant Harris. This agreement (the Harris MOU) was effective April 1, 2002, through May 31, 2010. Although no GPO positions were in existence on April 1, Alabama Power advertised for the positions from about March 28 through about April 7, 2002, and filled 15 GPO positions at Plant Harris in July and August 2002. Of the 15 GPOs initially hired to staff Plant Harris, 14 were transferred from other Alabama Power plants or facilities; only one was hired from outside the Southern Company.

In January 2006, Local 801-1 requested bargaining with Alabama Power, pursuant to a contractual wage reopener clause and the parties agreed to a new wage agreement at that time. In accordance with its services agreement with Respondent, Alabama Power continued to operate, maintain, and repair all generating units at Plant Harris until January 25, 2008.

Plants Wansley, Dahlberg, and Franklin. To meet its contractual obligations with Respondent to provide skilled labor necessary to operate Plants Wansley, Dahlberg, and Franklin, Georgia Power determined that it needed to create a new GPO position that was not covered under the then current collective-bargaining agreement. Local 84 and Georgia Power entered into a memorandum of understanding dated January 4, 2000 (the Georgia MOU) encompassing rates of pay, hours, and other terms and conditions of employment for GPOs at Plants Wansley, Dahlberg, and Franklin. As of January 4, no individuals were employed by Georgia Power as GPOs at the above plants. However, beginning in March 2000 and continuing over the next 2 years, Georgia Power fully staffed all three plants with GPOs, most of whom transferred from other Georgia Power facilities or other Southern Company facilities. Since 2000, Georgia Power and Local 84 have negotiated successive collective-bargaining agreements, which include in the bargaining unit the GPOs employed by Georgia Power at Plants Wansley, Dahlberg, and Franklin. Georgia Power continued to provide GPOs to operate, maintain, and repair all generating units at Plants Wansley, Dahlberg, and Franklin in accordance with its services agreement with Respondent.

The Takeover by Southern Power

On or about January 11, 2008, Respondent Southern Power sent notice to Georgia Power and Alabama Power of its intent to terminate the labor services portion of their service agreements applicable to the operation of Plants Wansley, Dahlberg, Franklin, and Harris, thus having Respondent employ its own plant operators in the classifications of Operations Technicians (OTs) instead of the GPOs employed by Alabama Power and Georgia Power. The reason for this action was that Respondent's management believed that it had to separate Georgia Power and Alabama Power employees from Respondent so that it could eliminate business and regulatory risks under certain FERC rulings. Nothing in those rulings, however, required Respondent to withhold union recognition and bargaining or prohibited union recognition and bargaining.

On or about January 25, 2008, Respondent terminated its labor services arrangements with Alabama Power and Georgia Power with respect to the operation of Plants Wansley, Dahlberg, Franklin, and Harris and took over the operation, maintenance and repair of all generating units at those plants. Since then, Respondent has been substantially engaging in the same business operations, at the same location, providing the same product, and has employed as a majority of its employees, individuals who were previously employees of Alabama Power or Georgia Power at these facilities.

On or about January 11, 2008, Respondent made written offers of employment for the newly minted OT positions at the four facilities involved to all GPOs employed by Alabama Power and Georgia Power at Plants Dahlberg, Franklin, Wansley, and Harris. Included in those offers was a document listing a summary of changes in terms and conditions of employment if the GPOs accepted the offers of employment as OTs. Alabama Power offered its affected employees the option to relocate and bid for employment at other Alabama Power facilities in accordance with the applicable bargaining agreement with Local 801-1; and Georgia Power offered its affected employees the option to relocate and bid for positions at other Georgia Power facilities in accordance with the applicable bargaining agreement with Local 84.

At Plant Harris, all but one of the 17 affected employees accepted Respondent's offer of employment. At Plant Wansley, all but three of the 15 affected employees accepted Respondent's offer of employment. At Plant Dahlberg, all but one of the five affected employees accepted Respondent's offer. At Plant Franklin, all of the 21 affected employees accepted the offer. There was no hiatus in employment for any of these individuals between the time they worked for Alabama Power or Georgia Power and the time they worked for Respondent. After the employees transitioned from the GPO classification to the OT classification, there were approximately 4 OTs employed at Plant Dahlberg; 21 OTs employed at Plant Franklin; 12 OTs employed at Plant Wansley; and 16 OTs employed at Plant Harris.

There were no changes in the terms and conditions of employment for the new OTs hired at the four facilities by Respondent, except for a wage increase, performance bonus target plan, personal time off policy and health insurance. In all other material respects, their job duties, immediate supervision, and job locations essentially remained the same. The individuals who were the plant managers at the four facilities when they were run by Alabama Power and Georgia Power remained plant managers after the transition to the Respondent.

The Refusal to Bargain

On or about January 15, 2008, and continuing to date, Local 84 has requested that Respondent recognize and bargain with Local 84 as the exclusive bargaining representative for the OTs employed at Plants Dahlberg, Franklin, and Wansley. Since that date, Respondent has refused and continues to refuse to recognize and bargain with Local 84 for those employees. On or about January 24, 2008, and continuing to date, Local 801-1 has requested that Respondent recognize and bargain with Local 801-1 as the exclusive bargaining representative for the OTs employed at Plant Harris. Since that date, Respondent has refused and continues to refuse to recognize and bargain with Local 801-1 for those employees. According to one of Respondent's witnesses, the Respondent refused to recognize and bargain with these unions because "we had no indication from our employees that they wanted a representative," it did not have union representation at its other four plants, and the employees at the four plants that Respondent took over in January of 2008 "voluntarily left their positions at Alabama Power and Georgia Power to come work with Southern Power." (Tr. 41.)

The Complaint

The consolidated complaint alleges that Respondent is a successor employer for the OTs in the Alabama unit and that its refusal to bargain with Local 801-1 for the following appropriate unit violated Section 8(a)(5) of the Act:

> All operations technicians employed by the Respondent at Plant Harris, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

The consolidated complaint also alleges that Respondent is a successor employer for the OTs in the Georgia unit and that its refusal to bargain with Local 84 for the following appropriate unit violated Section 8(a)(5):

> All operations technicians employed by the Respondent at Plant Dahlberg, Plant Franklin, and Plant Wansley, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

Discussion and Analysis

Under the Board's successorship doctrine upheld by the Supreme Court, a new employer who maintains generally the same business as the predecessor and hires a majority of its employees from the predecessor also assumes the bargaining obligation of the predecessor. Where the predecessor union has a presumption of majority status, for example, through contractual recognition by the predecessor, as here, that status continues despite the change of employers. The focus of the successorship inquiry is on whether there has been a "substantial continuity" between the two enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. "Substantial continuity" is measured from the perspective of the employees who, as the Supreme Court observed, will view their jobs as essentially unchanged, including their legitimate expectation of continued representation. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987).

In this case, all of the relevant factors point to a substantial continuity of the employing enterprise. Respondent hired a majority of the employees at the four facilities. All were represented by an incumbent union for at least 6 years before the transition to the Respondent. The GPOs at Plant Harris were covered under a separate collective-bargaining agreement; the GPOs at the other facilities were specifically covered under an overall agreement applicable to a number of additional facilities. The work and the working conditions of the affected employees remained essentially the same. They worked at the same location, performed the same jobs on the same equipment and reported to the same supervisors and managers. And there was no hiatus between the operations of the predecessor and the successor. In these circumstances, I find that there was a substantial continuity in the employing enterprise. Thus, given the Respondent's hiring of a majority of the work force at Plant Harris as well as at the three other facilities (Plant Wansley, Dahlberg, and Franklin), I also find that Respondent was a successor employer in those units, which had been represented by unions at the predecessor employer.

The Respondent raises several defenses. The first is that both Alabama Power and Georgia Power unlawfully recognized the respective unions in the units involved here. (Br. 17–21.) The basis for this contention is that the predecessors entered into "illegal prehire agreements" because recognition was accorded before employees were hired in those units, even though employees were shortly transferred into those unit positions from elsewhere in the union-represented predecessor companies and the employees were covered under successive collective-bargaining agreements over a period of 6 years or more before Respondent's takeover. Respondent's defense must fail, however, because it may not raise the alleged illegality of the earlier recognition—which would have been an unfair labor practice if true.[2] For obvious policy reasons, an unfair labor

[2] The General Counsel asserts (Br. 26–27) that the initial bargaining agreements covering the Georgia Power and Alabama Power GPOs were not illegal prehire agreements, but rather lawful clarifications of existing units. I agree. Respondent has not, on this record, persuasively established that the agreements were illegal. They were simply attempts to cover new classifications which were related to those historically performed by other employees, as demonstrated by the fact that most of the positions were filled by existing union-represented employees at other facilities shortly after the agreements were signed.

practice must be brought forward within 6 months of its occurrence under Section 10(b) of the Act. The Board has specifically held that a successor employer may not attack the validity of the initial recognition of a union by a predecessor if that recognition took place outside the 10(b) period. *Alpert's, Inc.,* 267 NLRB 159, 160 fn. 1 (1983). See also *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143, 144 fn. 8 (2007); and *International Hod Carriers*, 153 NLRB 659, 659 fn. 3 (1965).[3]

Respondent also contends (Br. 27–30) that there is no substantial continuity in the employing entities because Respondent is fundamentally different in both size and operation from the predecessor employers. That contention does not defeat a finding of substantial continuity in this case, based on the evidence set forth above. Even though Respondent is an energy wholesaler and not an energy retailer, like the predecessors, that fact is of little significance in assessing substantial continuity of the employing enterprise, particularly since Respondent and the predecessors are all owned by the same holding company and they all run generating plants. The employing enterprises are not the overall companies involved, but the four facilities whose employees were taken over by Respondent. Respondent nevertheless argues that the predecessor companies are much larger at least in terms of employees than Respondent, which employs only about 300 employees and operates only eight plants, including the four at issue in this case. Moreover, according to the Respondent, the OTs at the four plants taken over by Respondent comprise only a small number of the predecessor's employees. These factors likewise do not destroy the substantial continuity of the employing enterprise.

As a general matter, it is well settled that a mere diminution in the size of a successor's unit, as compared with that of the predecessor does not "change the nature of the [employing entity] so as to defeat the employees' expectation in continued representation by their union." *Fall River*, supra at 46 fn. 12. As the Seventh Circuit has recognized, "the Board may treat a much reduced bargaining unit as a miniature of the former unit." *Zim's IGA Foodliner v. NLRB*, 495 F.2d 1131, 1141 (7th Cir. 1974), cert. denied 419 U.S. 838 (1974). See also *Bronx Health Plan*, 326 NLRB 810, 812 (1998), enfd. mem. 203 F.3d 51 (D.C. Cir. 1999); *Lincoln Park Zoological Society,* 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997).

In support of its contention, Respondent cites and relies upon *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), in which the Board declined to find a successorship bargaining obligation where the employees taken over by the successor constituted a distinct but small percentage of the predecessor's represented employees. But that case, which as the Board stated, presented "peculiar circumstances," is distinguishable from the situation here. In that case, the successor took over a mail and distribution operation, which was only a "small fraction" of the 14,000 employees in the companywide unit recognized by the predecessor, Trans World Airlines (TWA). The entire complement of employees hired by the successor, 41, constituted less than 4 percent of the total number of 1100 employees working at the particular location involved, only 27 of which came from the former TWA unit. Thus, as the Board stated, the former TWA unit became "doubly diluted." Moreover, TWA was a large nationwide company, engaged primarily in transportation and related fields governed under the Railway Labor Act, whereas the successor was a small localized organization much different in character than the predecessor. Although the Board failed to find a successorship violation, it did determine that the successor violated the Act by failing to recognize the union thereafter, despite evidence that a majority of the employees it hired desired union representation. In enforcing that part of the order and upholding the Board's finding on the successorship issue on a somewhat narrower ground, the reviewing court criticized the Board's reasoning on the successorship issue. *Machinists v. NLRB,* 498 F.2d 680, 683 fn. 3 (D.C. Cir. 1974). Indeed, the Board itself subsequently acknowledged that *Atlantic Technical* was "factually unique." See *University Medical Center*, 335 NLRB 1318, 1333 (2001), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003).

Here, on the other hand, the Respondent operates in the same industry as the predecessors, and indeed, is part of the same corporate structure. Moreover, there was no diminution in the Plant Harris unit because Respondent hired all the OTs (previously GPOs) at Plant Harris, all of whom had been covered under a separate bargaining agreement. There was some diminution in the other unit since the OTs (previously GPOs) at the other three facilities were part of a larger multiplant unit. But that larger unit was nowhere near as large or as different as the predecessor's unit in *Atlantic Technical*. Indeed, according to uncontradicted testimony, the OTs (previously GPOs) at the other three facilities were covered under the Georgia Power/Local 84 agreement as part of the generation division that numbers some 600 to 800 employees. Moreover, unlike the employees in *Atlantic Technical*, their job functions were closely related to those of the other employees covered in the generation division of the Georgia Power agreement (Tr. 26–27). And, unlike in *Atlantic Technical*, the union-represented employees in the predecessor units had been transferred from other union-represented units. Finally, unlike in *Atlantic Technical*, the successor employer is not a small company that operates only those entities that it took over from the predecessors. It is in the business of running electric generating plants, the same business engaged in by the predecessors.

Respondent also alleges (Br. 33, 38) that the employees at the four facilities it took over decided not to transfer into other

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An existing unit may be clarified to accomplish this result. See *Premcor Inc.*, 333 NLRB 1365 (2001).

[3] Respondent was not a complete neutral in the operation of the four facilities at issue here. Respondent, a corporate affiliate of the predecessors, owned the plants involved and had labor services contracts with the predecessors to run the plants. Indeed, one of Respondent's senior officials testified he had responsibility over those operations and was familiar with the collective-bargaining agreement covering affected employees at three of the facilities. Tr. 51–53. In these circumstances, it is reasonable to infer that Respondent had knowledge of the initial and continuing union representation at the facilities involved herein. Thus, even apart from the 10(b) bar to its defense, Respondent is estopped from raising at this late date an allegation that the employees initially hired to run those plants by the predecessors were part of an illegal prehire arrangement. See *Strand Theater of Shreveport Corp.,* 346 NLRB 523, 536–537 (2006), enfd. 493 F.3d 515 (5th Cir. 2007).

jobs at Alabama Power and Georgia Power where they could have retained union representation and instead decided to transfer into its essentially nonunion environment. From this premise, Respondent argues that the employees had no legitimate expectation of continued representation and that Respondent had a good-faith doubt of the incumbent unions' continued majority status. All of these arguments lack merit.

The Respondent misperceives the effect of a successorship finding on continued representation rights as reflected in *Fall River* and other successorship cases. The Supreme Court's reference to the legitimate expectation of continued representation did not mean that this was a matter to be proved or disproved through litigation. The Court was merely stating that when a finding of substantial continuity is made it is a natural inference, indeed, a legal conclusion, that the affected employees have a legitimate expectation of continued representation. Respondent also derives from its premise that it had a good-faith doubt of the continued majority status of the incumbent unions in the four facilities involved here. That again is wrong as a matter of law. The finding of substantial continuity in the employing enterprise precludes any attack on the majority status of the incumbent unions. Indeed, Respondent misreads (Br. 37–38) the footnote in *Fall River*, supra at 41 fn. 9, it cites in support of its position. In the referenced footnote, the Court assumed that a legal successor first had the duty to negotiate with the predecessor's incumbent union, but, if in subsequent negotiations it had evidence of an actual loss of majority or objective evidence that led to a good-faith doubt of majority it could lawfully withdraw from further bargaining. In this case, Respondent never undertook to recognize or negotiate with the incumbent unions. It refused to recognize the incumbent unions based on circumstances surrounding its takeover of the four facilities, namely that employees chose to keep their existing jobs with the successor rather than to transfer to other unionized facilities of the predecessors. In any event, the fact that employees took "nonunion" jobs does not establish that they no longer wanted union representation; their primary concern was to keep their existing jobs. See *Siemens Building Technologies*, 345 NLRB 1108, 1109 (2005), where a similar argument was rejected. Thus, not only does Respondent's assertion that the employees rejected union jobs at the predecessors to take its nonunion jobs not amount to a loss of majority or even of a good-faith doubt of majority, but it is simply an incidental effect of the substantial continuity of the employing enterprise when, as here, the successor hires a majority of the predecessor's employees and continues the same basic operation and working conditions. Moreover, the reference to good-faith doubt in the *Fall River* footnote is outdated. Since the *Fall River* decision the law of withdrawal of recognition has changed. Good-faith doubt of majority is no longer a defense to withdrawal of recognition. An employer must show an actual loss of majority. See *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001); and *Siemens Building Technologies*, supra at 1109. This Respondent has failed to do.

Respondent also contends (Br. 31–32) that it cannot be a legal successor because it did not purchase the assets of the predecessors, citing *Harter Tomato Products Co.*, 321 NLRB 901, 902 (1996), enfd. 133 F.3d 934 (D.C. Cir. 1998). This contention is likewise without merit and somewhat disingenuous since Respondent owned the plants in question, and, previous to its takeover, had contracted out the operation of the plants to Georgia Power and Alabama Power. The Board's discussion, in *Harter*, of two examples of "typical" successorship cases was not meant to act as a limitation on the types of transactions that amount to a substantial continuity sufficient to trigger a bargaining obligation. Indeed, the General Counsel has cited cases (Br. 28–29) in which successorship findings have been based on employers recapturing a previously subcontracted operation. See *Saks Fifth Avenue*, 247 NLRB 1047 (1980), enfd. in part 634 F.2d 681 (2d Cir. 1980); and *Cablevision Systems Development Co.*, 251 NLRB 1319 (1980), enfd. 671 F.2d 737 (2d Cir. 1982), cert. denied 459 U.S. 906 (1982). See also *G.T.E. Data Services Corp.*, 194 NLRB 719, 720–721 (1971).

Finally, the Respondent contends that the two units alleged in the complaint—Plant Harris and the combined three former Georgia Power facilities of Plants Wansley, Dahlberg, and Franklin—are not appropriate units and therefore Respondent was free to refuse to bargain in those units. It is undisputed that a successor employer may advance as a defense to a successorship bargaining obligation that the unit in which it is required to bargain is an inappropriate unit. It is also well settled that single plant units are presumptively appropriate, even in a successorship context. See *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063 (2001); *Children's Hospital,* 312 NLRB 920, 928 (1993), enfd. 87 F.3d 304 (9th Cir. 1995). This presumption is overcome only if the single-facility unit "has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Dattco, Inc.,* 338 NLRB 49, 50 (2002).

In its brief, Respondent does not contest the appropriateness of the Plant Harris unit. Plant Harris is a single facility, which, as indicated above, is presumptively appropriate. Moreover, that unit has historically been the subject of separate collective bargaining and Respondent has offered no evidence and no reason why bargaining cannot continue in such a historically valid and presumptively appropriate unit. I find therefore that the Plant Harris unit is an appropriate unit.

Respondent's brief (Br. 35–37) instead concentrates on an attempt to show that the second unit, the employees in the three-plant former Georgia Power unit, is not an appropriate unit. Unlike Plant Harris, that unit was not itself an historic separate bargaining unit under the predecessor employer; it was part of a greater overall unit. Moreover, as Respondent points out, those three plants are now part of a grouping that includes a total of eight plants owned and operated by Respondent. The three plants are in two different states (Georgia and Alabama) and they are between 70 and 185 miles away from each other. There is no evidence on this record of an interchange of employees or functional integration in the separate three-plant unit. The only evidence in support of a three-plant unit is that, as a part of a multiemployee, multiplant unit under the predecessor, the employees had many of the same benefits, which were retained, with minor changes, when Respondent took over the operations of the three plants. But that circumstance alone does not operate to overcome the presumption that single plant

units at each of Plant Wansley, Franklin, and Dahlberg are appropriate.

In advancing the appropriateness of the three-plant former Georgia Power unit, the General Counsel and the Charging Parties contend that historically-established bargaining units will not lightly be disturbed in successorship situations, citing *Ready Mix USA, Inc.*, 340 NLRB 946, 947 (2003). But that principle does not apply here because the three-plant former Georgia Power unit, which Respondent took over, was not a separate historical unit. The employees in the three plants involved here were part of a much broader multiplant unit of Georgia Power employees. Indeed, both *Ready Mix* and another case chiefly relied upon by the General Counsel and the Charging Parties, *Children's Hospital*, cited in full above, are clearly distinguishable from the situation here. In *Ready Mix*, the successor purchased all three plants operated by the predecessor and all had been included in a single bargaining unit. In *Children's Hospital*, the predecessor's unit was a presumptively appropriate single unit facility. Thus, neither case supports the position that the three-plant former Georgia Power unit is a historically-recognized appropriate unit.

Actually, the strongest case in support of that position is *White-Westinghouse*, 229 NLRB 667, 675 (1977), enfd. sub nom. *Electrical Workers v. NLRB*, 604 F.2d 689 (D.C. Cir. 1979), cited by the General Counsel for a different point in his brief (Br. 31). But that case is likewise distinguishable from the situation here. In *White-Westinghouse*, the successor purchased some, but not all, of the plants in the predecessor's multiplant unit. The Board nevertheless found that there was a substantial continuity of the employing entity. But it also found that the purchased grouping was an appropriate unit. Unlike in this case, however, the successor in *White-Westinghouse* created a subsidiary specifically formed to hold the plants purchased from the predecessor and assumed the predecessor's collective-bargaining agreement, applying it to the employees in the plants it had purchased. No such circumstances are present in this case.[4]

I also note, however, that Local 84 has expressed an interest in bargaining in single plant units (Br. 13 fn. 13, Tr. 67). The record herein does not include the letter demand for bargaining by Local 84 and the stipulation of the parties simply states that "[s]ince on or about January 15, 2008, and continuing to date, Local 84 has requested that [Respondent] recognize and bargain with Local 84 as the exclusive bargaining representative for employees employed as OTs at Plants Dahlberg, Franklin and Wansley." In view of Local 84's clarification set forth above, I read the stipulation as setting forth a request to bargain in each single plant unit, as well as in the overall three-plant unit. Even assuming, however, that Local 84's bargaining demand was limited to the three-facility unit it formerly represented rather than for each of the plants individually, Local 84 is entitled to bargain in the single plant units whose employees it represents. Because parties in a successorship situation cannot know definitively the appropriateness of the unit in which they are obligated to bargain, the requirement for specificity in a successorship bargaining demand is not absolute. See *Trident Seafoods*, 318 NLRB 738, 739 (1995), enfd. in part 101 F.3d 111 (D.C. Cir. 1996); and *Hydrolines, Inc.,* 305 NLRB 416, 420 (1991). Moreover, Respondent's refusal to bargain was not based on its view that Local 84's demand was too broad or that the three-plant former Georgia Power unit was inappropriate. It refused to bargain in any unit. In these circumstances, it was incumbent on Respondent "to seek clarification, which it did not do." *Trident Seafoods*, supra at 739. Nor does anything in Respondent's argument that the three-plant unit was inappropriate cast doubt on Local 84's presumptive majority status in each of the constituent single plant units. It is clear that the presumptive majority status of Local 84 in each of the single plant units continued as a consequence of its presumptive majority status in the overall unit because of the substantial continuity of the employing entity. Thus, each of the single plant units can be viewed as "a miniature" of the three-plant unit. See *Zim's IGA Foodliner v. NLRB,* supra at 1141, as well as other cases cited at page 7 of this decision. I therefore find that Respondent was required to bargain with Local 84 in each of the single plant units in which it had a previous bargaining relationship.

In view of my findings set forth above, I find that the Respondent, as a successor employer, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 801-1 for the Plant Harris OT employees and with Local 84 for the OT employees at Plant Wansley, Plant Franklin, and Plant Dahlberg.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 801-1 in the following appropriate unit:

> All operations technicians employed by Respondent at Plant Harris, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

2. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 84 in the following three appropriate units.

(a) All operations technicians employed by Respondent at Plant Dahlberg, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

[4] The General Counsel also cites *Siemens Building Technologies*, 345 NLRB 1108, 1008 fn. 2 (2005), in support of its position that the "bargaining units alleged in the complaint should be found to be appropriate." (Br. 22.) But, in that case, the Board simply corrected the judge's "inadvertent" failure to include a unit description in his decision. To the extent that the Board commented on the appropriate unit issue in its footnoted discussion, the Board simply stated that the bargaining unit alleged in the complaint "is essentially the same as the unit described in the collective bargaining agreement between the predecessor (Monroe County) and the Union." Indeed, the successor purchased only the one plant from the predecessor; and that one plant was also the presumptively appropriate unit, even though the predecessor's bargaining agreement included other facilities. Thus, the situation in *Siemens* is very different from the situation presented in the three-plant Georgia Power takeover in this case.

(b) All operations technicians employed by Respondent at Plant Franklin, excluding all other employees, office clerical employees, professional employees, guards, and supervisors, as defined in the Act.

(c) All operations technicians employed by Respondent at Plant Wansley, excluding all other employees, office clerical employees, professional employees, guards, and supervisors, as defined in the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such violations, take affirmative action to remedy them, including recognizing and bargaining with Local 801-1 and Local 84 as a successor employer, and post an appropriate notice.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[5]

ORDER

The Respondent, Southern Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 801–1 as the exclusive bargaining representative of the employees in the following appropriate unit:

> All operations technicians employed by Respondent at Plant Harris, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(b) Failing and refusing to recognize and bargain with Local 84 as the exclusive bargaining representative of the employees in the following appropriate units:

> All operations technicians employed by Respondent at Plant Dahlberg, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.
>
> All operations technicians employed by Respondent at Plant Franklin, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.
>
> All operations technicians employed by Respondent at Plant Wansley, excluding all other employees, office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, recognize and bargain with Local 801-1 for the employees it represents in the above appropriate unit of Plant Harris employees; and, upon request, recognize and bargain with Local 84 for the employees it represents in the above appropriate units of employees at Plants Dahlberg, Franklin, and Wansley.

(b) Within 14 days after service by the Region, post at its facilities at Plants Harris, Dahlberg, Franklin, and Wansley copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by Respondent at any time since January 15, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that Respondent has taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."